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Federal Communications Commission

FCC 98-267

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of)

HERBERT L. SCHOENBOHM)
Kingshill, Virgin Islands)

WT Docket No. 95-11

For Amateur Station and)
Operator Licenses)

ORDER

Adopted: October 6, 1998

Released: October 9, 1998

By the Commission:

1. This Order denies a petition for reconsideration of a Commission Decision that affirmed a Supplemental Initial Decision denying the application of Herbert L. Schoenbohm to renew amateur station and operator licenses. *Herbert L. Schoenbohm*, FCC 98-139 (rel. July 8, 1998), *affirming*, 13 FCC Rcd 1853 (ALJ 1997). The Commission agreed with the ALJ that nonrenewal of the licenses was justified. It found that the licensee had misrepresented and lacked candor in testimony concerning both the felony telephone fraud conviction and the facts underlying the designated *ex parte* issue. It also noted that the licensee's criminal conduct involved fraudulent activity, a matter of particular concern to the Commission because it relates to a licensee's propensity to be truthful with the Commission. Based on a totality of the evidence, the Commission therefore determined that Schoenbohm had not demonstrated that he possesses the basic character of truthfulness that is essential to licenseeship. *Commission Decision* at ¶¶ 26-27.

2. On August 5, 1998, Schoenbohm filed a petition for reconsideration of the Commission's nonrenewal of his amateur station and operator licenses. The licensee urges that his criminal activity (*i.e.*, the use of a counterfeit access device) is far less serious than the criminal convictions of applicants that were found qualified to hold Commission licenses in other cases,¹ and that the *ex parte* rules as applied in this case violate his First Amendment rights. The

¹ Schoenbohm relies on *Richard Richards*, 10 FCC Rcd 3950 (Rev. Bd. 1995) (marijuana distribution); *Alessandro Broadcasting Co.*, 99 FCC 2d 1 (Rev. Bd. 1984) (murder); *Swan Broadcasting Limited*, 6 FCC Rcd 17 (Rev. Bd. 1991) (manslaughter).

licensee also surmises, based upon rumors and an amateur radio conversation, that the proceeding may have been tainted as a result of improper *ex parte* contacts with the Administrative Law Judge by various amateur radio operators who are critical of Schoenbohm. While not questioning the integrity of now-retired Judge Edward Luton, the licensee asks the Commission to ascertain whether the ALJ received any telephone calls, to disclose the nature, timing and number of any such calls, and to evaluate whether the proceeding was tainted. In reply to the Bureau's opposition, Schoenbohm concedes that, in an effort to secure additional evidence regarding this matter and in the hope that the Commission would overturn the ALJ's ruling, he delayed submitting a transcript of a conversation regarding rumors of *ex parte* violations, which he taped on January 17, 1998.

3. We deny the petition for reconsideration. As the Bureau notes in its opposition, the cases cited by the licensee are inapposite because the criminal activity in those cases, in contrast to Schoenbohm's use of counterfeit access devices, did not involve fraud. In this regard, Schoenbohm was convicted of having violated 18 U.S.C. § 1029(a)(1) penalizing the use of such devices "knowingly and with intent to defraud." In denying Schoenbohm's application to renew the amateur station and operator licenses, the Commission specifically indicated that, because using illicitly obtained telephone access codes involved fraud, it was particularly relevant in assessing Schoenbohm's propensity to be truthful with the Commission, a matter of critical concern in awarding licenses. The Commission also rejected the licensee's constitutional claims regarding an *ex parte* issue specified by the ALJ. That issue concerned compliance with Section 1.1210 providing that "[n]o person shall solicit or encourage others to make any presentation which he or she is prohibited from making under [the Commission's *ex parte* rules]." In the Commission's view, rules intended to protect the integrity of the administrative process by requiring that presentations to the agency be made on the record and that solicitations of such presentations be limited to requests for on-the-record presentations did not violate the First Amendment. And, in any event, the actual *ex parte* violation was not a basis for the decision not to renew Schoenbohm's amateur station and operator licenses. That determination rested instead on the licensee's misrepresentation and lack of candor concerning both the *ex parte* issue and the felony telephone toll fraud conviction, in combination with the conviction itself. It is well established that the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated and spoken. See *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). Thus, to the extent that Schoenbohm again challenges the determination that his misrepresentation and lack of candor, as well as the actual felony fraud conviction, justify nonrenewal, his petition for reconsideration is denied.

4. The suggestion that improper *ex parte* presentations to Judge Luton by unnamed persons may have tainted this proceeding is also not a basis to grant reconsideration. Under Section 1.106(c) the Commission will grant a petition for reconsideration that relies on facts not previously presented to the Commission only if it is based on changed circumstances or newly discovered facts that could not, through the exercise of ordinary diligence, have been discovered earlier, or if the public interest requires consideration of such matters. The request that the Commission explore possible *ex parte* contacts with the ALJ is untimely. Indeed, petitioner relies on the transcript of a conversation that he taped on January 17, 1998, or more than six months before the Commission's June 29, 1998 decision. His explanation for not bringing this

matter to the Commission's attention until August 5, 1998 is that, in addition to his unsuccessful attempt to secure additional evidence of the *ex parte* contacts, "Schoenbohm harbored the hope that the Commission would overturn the Judge's ruling and renew his amateur license." Reply at 1. However, it is incumbent on an applicant to present his arguments as early as possible; it may not rest on its rights in the hope that the passage of time will improve its position. See *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 27 (D.C. Cir. 1941).

5. More importantly, the request that the Commission inquire further into this matter is based solely on hearsay, speculation, and rumor. The Commission's rules prohibit *ex parte* presentations in all restricted proceedings (Section 1.1208) and define presentation as a communication directed to the merits or the outcome of a proceeding (Section 1.1202(a)). Schoenbohm therefore must present at least some probative evidence that the ALJ (or other decision-making personnel involved in preparing the Supplemental Initial Decision) was actually contacted by persons who made impermissible *ex parte* presentations. In this regard, Schoenbohm asserts that "[s]ince this case was designated for hearing, [he] has heard recurrent rumors, circulating on the amateur bands, that some of these amateurs [who are critical of Schoenbohm] made telephone calls to the Administrative Law Judge."² To corroborate this assertion, Schoenbohm relies solely on the transcript of an amateur radio transmission between Charles "Doc" Swartzbard, AF2Y, and Wesley "Wes" Chupp, W2OC-Q (on 14,313 MHz), as to whether "those people who wrote or called Judge Luton" must disclose such communications under the Commission's *ex parte* rules.³ The quoted portion of the transcript, however, does not provide probative evidence that anyone contacted or attempted to contact Judge Luton, let alone that any such contact reached the Judge (or other decision-making personnel) or that any ensuing discussion impermissibly related to the merits of this proceeding.

6. In any event, it is quite possible that, even if individuals critical of Schoenbohm did attempt to contact the ALJ, he (or his staff) successfully cut off the conversation before there was any discussion of the merits (*i.e.*, Schoenbohm's fitness to retain the licenses). See Section 1.1212(a). We note that there is no record of any statements prepared by Judge Luton and forwarded to the Office of General Counsel, as is required by Section 1.1212(b) when prohibited *ex parte* presentations are made to decision-making personnel. Schoenbohm, who claims that he does not question the ALJ's honesty and integrity, offers no reason why the ALJ would not have followed these procedures if he did, in fact, receive prohibited *ex parte* presentations concerning the merits of this proceeding. In these circumstances, we believe that it is reasonable to infer from the absence of any record of such a statement that the ALJ did not receive any prohibited

² Schoenbohm's Petition for Reconsideration at 2-3.

³The transcript reflects a heated debate as to whether oral, as well as written, *ex parte* presentations must be disclosed, with Wes Chupp correctly urging that the rules require disclosure of all types of *ex parte* presentations. Swartzbard, identified as one of Schoenbohm's most vocal detractors, took the opposite position. He stated, for example, that

. . . so the thing is this you are saying that the ex-parte [sic] works two ways that the ex-parte [sic] rule should have applied to those people who wrote or called Judge Luton and my reply is that you are wrong. The people who called Judge Luton were not on trial. They did not have to go to the hearings.

ex parte contacts, and that he fulfilled his responsibilities in a fair and impartial manner based solely on the record, as 5 U.S.C. § 556(d) requires.

7. Moreover, neither *Press Communications Co. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995), nor *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1998), supports Schoenbohm's assertion that further inquiry is warranted here. The court in *Press* indicated that, in a case in which *ex parte* contacts had occurred, even without a threshold showing of contact with the ultimate decisionmaker, a weakly supported determination by that decisionmaker might be a basis to infer that *ex parte* contacts had influenced the decision. *Id.*, citing *ATX, Inc. v. United States Dept. of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994). As noted above, however, Schoenbohm has not raised a substantial question that any *ex parte* contacts occurred in this proceeding. Furthermore, having affirmed the Supplemental Initial Decision in all respects based on our *de novo* review of the record, we find nothing about the ALJ's determinations regarding Schoenbohm that would support an inference of improper influence here. Similarly, Schoenbohm cites *Freeman* for the proposition that a decision's agreement with the views expressed in an *ex parte* presentation signifies that that decision must have been the result of improper influence. But there are no similar facts here, and, standing alone, the mere fact that the ALJ's decision may reflect the position that Schoenbohm's critics presumably would have taken had they made prohibited *ex parte* presentations to the ALJ is not a basis to infer that the ALJ's decision was tainted as a result of prohibited *ex parte* communications. Therefore, in the absence of specific allegations of fact that would support an inference of improper *ex parte* contacts, there is no basis to inquire further into this matter.

8. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed August 5, 1998 by Herbert L. Schoenbohm IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary